JUDGMENT OF THE COURT (First Chamber)

26 March 2009 *

In Case C-348/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Landgericht Hamburg (Germany), made by decision of 18 June 2007, received at the Court on 27 July 2007, in the proceedings

Turgay Semen

v

Deutsche Tamoil GmbH,

THE COURT (First Chamber),

composed of P. Jann, President of Chamber, M. Ilešič, A. Tizzano, E. Levits (Rapporteur) and J.-J. Kasel, Judges,

* Language of the case: German.

Advocate General: M. Poiares Maduro,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 18 September 2008,

after considering the observations submitted on behalf of:

— T. Semen, by H.-J. Rust, Rechtsanwalt,

— Deutsche Tamoil GmbH, by T. Wambach, Rechtsanwalt,

— the German Government, by M. Lumma, J. Kemper and T. Baermann, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, and S. Fiorentino, avvocato dello Stato,

— the Commission of the European Communities, by H. Støvlbæk and H. Krämer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 November 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 17 of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ 1986 L 382, p. 17, 'the Directive').

2 The reference was made in the course of proceedings brought by Mr Semen, lessee of a petrol station owned by Deutsche Tamoil GmbH ('Deutsche Tamoil'), in respect of the amount of the indemnity for termination of an agency contract payable to Mr Semen because of the termination of his agency contract by Deutsche Tamoil.

Legal context

Community law

3 Article 17 of the Directive provides:

‘1. Member States shall take the measures necessary to ensure that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraph 2 or compensated for damage in accordance with paragraph 3.

2. (a) The commercial agent shall be entitled to an indemnity if and to the extent that:

— he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers, and

— the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. Member States may provide for such circumstances also to include the application or otherwise of a restraint of trade clause, within the meaning of Article 20;

(b) The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question;

(c) The grant of such an indemnity shall not prevent the commercial agent from seeking damages.

…'

National rules

4 Paragraph 89b(1) of the German Commercial Code (Handelsgesetzbuch), in the version in force at the time of the facts in the main proceedings, transposes Article 17(2) of the Directive into national law. It is worded as follows:

'The commercial agent may, after termination of the agency contract, demand from the principal a reasonable indemnity if and to the extent that

1. The principal continues to derive substantial benefits, even after termination of the agency contract, from the volume of business with new customers which the commercial agent brought;

2. the commercial agent, by reason of the termination of the agency contract, loses rights to commission from business already transacted, and business to be transacted in the future, with customers he has brought, which he would have been entitled to if the agency agreement had remained in place; and

3. the payment of an indemnity is equitable having regard to all the circumstances.

If the commercial agent has expanded the volume of business with an existing customer so significantly that, in commercial terms, it is equivalent to acquiring a new customer, he is deemed to have brought a new customer.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

5 From 1 November 2001 until 31 December 2005, Mr Semen leased a petrol station from Deutsche Tamoil in Berlin. He mainly sold fuels and lubricants on behalf of and in the name of Deutsche Tamoil, but also phone cards issued by various network operators, which Deutsche Tamoil put at his disposal.

6 Deutsche Tamoil belongs to the State-owned Libyan Oilinvest Group, which in Germany operates a network of approximately 250 petrol stations, both under the A-grade brand name 'Tamoil', taken from its company name, and under the — cheaper — B-grade brand name 'HEM'.

7 The petrol station run by Mr Semen operated under the 'HEM' brand name. For fuels, his commission was calculated on the basis of quantities sold ('commission per litres

sold') and, for lubricants, it was calculated on the basis of turnover. If holders of a loyalty card entitling them to a discount from Deutsche Tamoil purchased fuel, the applicant's commission was reduced accordingly.

8 The Landgericht Hamburg was asked to rule on the indemnity payable to Mr Semen following termination of his agency contract with Deutsche Tamoil.

9 According to the German courts, the three criteria set out in Paragraph 89b(1) of the German Commercial Code are cumulative and limit each other. Accordingly, the indemnity cannot exceed the lowest of the amounts calculated in applying any one of the three criteria.

10 Basing itself on that case-law, the referring court is inclined to interpret Article 17(2)(a) of the Directive to the effect that that provision, pursuant to which the commission lost by the commercial agent represents only one element to be taken into account for the purposes of examining whether the payment of an indemnity is equitable, also makes it possible to take the view that the amount of commission lost by that commercial agent represents the upper limit for that indemnity.

11 Nevertheless harbouring doubts in respect of that interpretation of Article 17(2)(a) of the Directive, the Landgericht Hamburg decided to stay proceedings and to refer the following questions to the Court of Justice:

'1. Is it compatible with Article 17(2)(a) of the Directive to limit the indemnity to which a commercial agent is entitled by the amount of commission lost as a result of the termination of the agency contract, even though the benefits which the principal continues to derive have to be given a higher monetary value?

2. Are benefits accruing to other companies within the group to which the principal belongs also to be taken into consideration for the purposes of the above calculation?'

The questions referred for a preliminary ruling

Question 1

12 By its first question, the referring courts asks, in essence, whether Article 17(2)(a) of the Directive must be interpreted to the effect that it is not possible automatically to limit the indemnity to which a commercial agent is entitled by the amount of commission lost as a result of the termination of the agency contract, even though the benefits which the principal continues to derive have to be given a higher monetary value.

13 In that connection it must be observed, as a preliminary point, that the interpretation of Article 17 of the Directive is to be considered in the light of the aims pursued by the Directive and the system it establishes (see Case C-465/04 *Honyvem Informazioni Commerciali* [2006] ECR I-2879, paragraph 17).

14 Next, it is common ground that the Directive aims to coordinate the laws of the Member States as regards the legal relationship between the parties to a commercial agency contract. Accordingly, the Directive seeks in particular to protect commercial agents in their relations with their principals and, to that end, establishes, inter alia, rules governing the conclusion and termination of agency contracts, in Articles 13 to 20 (*Honyvem Informazioni Commerciali*, paragraphs 18 and 19).

15 As regards termination of a contract, Article 17(1) of the Directive introduces a system that allows Member States to choose between two options. Member States are to take the measures necessary to ensure that the commercial agent is, after termination of the agency contract, either indemnified in accordance with the criteria set out in paragraph 2 or compensated for damage in accordance with the criteria set out in paragraph 3.

16 The Federal Republic of Germany chose the option set out in Article 17(2).

17 According to settled case-law, the system established by Article 17 of the Directive concerning, in particular, the protection of the commercial agent after termination of the contract is mandatory in nature (Case C-381/98 *Ingmar* [2000] ECR I-9305, paragraph 21, and *Honyvem Informazioni Commerciali*, paragraph 22).

18 As regards the indemnity for termination of the agency contract, the Member States may exercise their discretion as to the choice of methods for calculating the indemnity only within the strict framework established by Articles 17 and 18 of the Directive (*Ingmar*, paragraph 21 and *Honyvem Informazioni Commerciali*, paragraph 35).

19 The procedure for the system laid down by Article 17 of the Directive can be broken down into three stages. The aim of the first stage is, first of all, to quantify the benefits accruing to the principal as a result of the volume of business with customers brought by the commercial agent, in accordance with the provisions of the first indent of Article 17(2)(a) of the Directive. The aim of the second stage is to check, in accordance with the second indent of that provision, whether the amount established on the basis of the abovementioned criteria is equitable, having regard to all the circumstances of the case and, in particular, to the commission lost by the commercial agent. Finally, at the third stage, the amount of the indemnity is subject to an upper limit provided for in

Article 17(2)(b) of the Directive, which only comes into play if the amount calculated during stages one and two exceeds it.

20 Consequently, since commission lost is only one of several elements relevant to determining whether the amount of indemnity is equitable, it is for the national court to determine, during the second stage of its assessment, whether the indemnity granted to the commercial agent is, ultimately, equitable, and therefore whether, and where relevant, to what extent, taking into account all relevant circumstances of the case, the indemnity may have to be adjusted.

21 In light of the aim of the Directive, as recalled in paragraph 14 of this judgment, under that system an interpretation of Article 17 of the Directive to the effect proposed by the referring court is permissible only if it will not prove to be detrimental to the commercial agent.

22 In that respect, moreover, the Court has already had occasion to refer to the Report on the application of Article 17 submitted by the Commission on 23 July 1996 (COM(96) 364 final). That report provides detailed information as regards the actual calculation of the indemnity and is intended to facilitate a more uniform interpretation of Article 17 (see *Honyvem Informazioni Commerciali*, paragraph 35). Thus the report lists various factors to be taken into consideration as part of the assessment in practice of the equitable nature of the indemnity, some of which are likely to militate in favour of a higher indemnity.

23 In the light of those considerations, therefore, the discretion that Member States have to adjust, where necessary, the indemnity payable to a commercial agent after termination of a contract in order to make it equitable cannot be construed to the effect that the indemnity can only be adjusted downwards. Such an interpretation of the second indent of Article 17(2)(a) of the Directive, which would allow any increase in the indemnity to be excluded automatically, would be detrimental to the commercial agent whose contract was terminated.

24 It follows that a practice, as described in paragraph 9 of this judgment, whereby the courts automatically exclude, for the purposes of the application of the criterion of equity, in a case where the benefits which the principal continues to derive exceed the estimated commission lost by the commercial agent, the possibility of any increase in that indemnity up to the maximum of the ceiling laid down in Article 17(2)(b) of the Directive, is not permissible.

25 In the light of the foregoing, the answer to the first question must be that Article 17(2)(a) of the Directive is to be interpreted to the effect that it is not possible automatically to limit the indemnity to which a commercial agent is entitled by the amount of commission lost as a result of the termination of the agency contract, even though the benefits which the principal continues to derive have to be given a higher monetary value.

Question 2

26 By the second question, the referring court asks, in essence, whether Article 17(2)(a) of the Directive must be interpreted to the effect that, where the principal belongs to a group of companies, benefits accruing to other companies of that group are deemed to be benefits accruing to the principal and are properly taken into account for the purposes of calculating the amount of indemnity to which the commercial agent is entitled.

27 An interpretation of the first indent of Article 17(2)(a) of the Directive must begin with the actual wording of the provision.

28 In this respect, it is appropriate to note that that provision is exclusively concerned with the contractual relationship between 'customers' and 'principal' and the benefits accruing to the 'principal' derived from the business transacted with such customers. A literal interpretation of the first indent of Article 17(2)(a) of the Directive therefore

leads to the conclusion that that provision precludes benefits accruing to third parties from being taken into consideration for the purposes of calculating the 'benefits accruing to the principal'.

29 That interpretation, namely one which takes into consideration only the relationship between the principal and the commercial agent, is supported by a systematic interpretation of that provision.

30 The ceiling on the amount of the indemnity, laid down in Article 17(2)(b) of the Directive, is calculated on the basis of the commercial agent's remuneration. As the Italian Government has submitted, even where the principal belongs to a group of companies, it is still always the principal — and only the principal — who will pay the remuneration, not the other companies in the group.

31 Finally, it is clear from the second recital to the Directive that it aims, inter alia, to ensure the security of commercial transactions and, consequently, legal certainty in the area of commercial representation. That objective precludes, in principle, the taking into consideration of benefits accruing to third parties, unless that is what was agreed contractually between the principal and the commercial agent. In this respect, it is for the national court to assess the agency contract in the light of the applicable national law.

32 In the light of the foregoing, the answer to the second question must be that Article 17(2)(a) of the Directive is to be interpreted to the effect that, where the principal belongs to a group of companies, benefits accruing to other companies of that group are not, in principle, deemed to be benefits accruing to the principal and, consequently, do not necessarily have to be taken into account for the purposes of calculating the amount of indemnity to which a commercial agent is entitled.

Costs

33 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Article 17(2)(a) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents is to be interpreted to the effect that it is not possible automatically to limit the indemnity to which a commercial agent is entitled by the amount of commission lost as a result of the termination of the agency contract, even though the benefits which the principal continues to derive have to be given a higher monetary value.**

2. **Article 17(2)(a) of Directive 86/653 is to be interpreted to the effect that, where the principal belongs to a group of companies, benefits accruing to other companies of that group are not, in principle, deemed to be benefits accruing to the principal and, consequently, do not necessarily have to be taken into account for the purposes of calculating the amount of indemnity to which a commercial agent is entitled.**

[Signatures]